

# **Exhibit D**

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Chapter 11 Trustee Alfred H. Siegel

**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**SANTA ANA DIVISION**

|  |   |  |
|--|---|--|
| In re  | ) | Case No. 8:08-bk-15588-ES  |
| LBREP/L-SUNCAL MASTER I, LLC, et al.                                 | ) | Chapter 11   |
| Debtor   | ) | (Jointly Administered with Case Nos.<br>8:08-bk-15637-ES; 8:08-bk-15639-ES;<br>and 8:08-bk-15640-ES)   |
| <hr/>  |   |  |
| <u>        </u> Affects LBREP/L-SunCal Master I, LLC                 | ) | <b>OMNIBUS OPPOSITION OF CHAPTER<br/>11 TRUSTEE TO MOTIONS FOR<br/>RELIEF FROM THE AUTOMATIC STAY<br/>FILED BY LEHMAN COMMERCIAL<br/>PAPER INC., MEMORANDUM OF<br/>POINTS AND AUTHORITIES IN<br/>SUPPORT THEREOF</b> |
| <u>Only</u>  | ) |  |
| <u>        </u> Affects LBREP/L-SunCal McAllister<br>Ranch, LLC Only | ) |  |
| <u>        </u> Affects LBREP/L-SunCal McSweeny<br>Farms, LLC Only   | ) |  |
| <u>        </u> Affects LBREP/L-SunCal Summerwind<br>Ranch, LLC Only | ) |  |
| <u>  X  </u> Affects All Debtors.                                    | ) | <b>DECLARATIONS OF ALFRED H.<br/>SIEGEL, HOWARD GROBSTEIN, EVAN<br/>D. SMILEY, AND LARRY WASBIN, MAI<br/>FILED SEPARATELY</b>  |
|  |   | DATE: November 20, 2008  |
|  |   | TIME: 2:00 p.m.  |
|  |   | PLACE: Courtroom 5A  |
|  |   | 411 West Fourth Street   |
|  |   | Santa Ana, CA 92107  |

**TO THE HONORABLE ERITHE A. SMITH, UNITED STATES BANKRUPTCY JUDGE:**

Alfred H. Siegel, chapter 11 trustee (the "Trustee") of the administratively  
consolidated estates of LBREP/L-Lehman SunCal Master I, LLC ("Parent Debtor"),  
LBREP/L-SunCal McAllister Ranch, LLC ("McAllister Ranch"), and LBREP/L-SunCal

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McSweeney Farms ("McSweeney Farms"), and LBREP/L-SunCal Summerwind Ranch ("Summerwind Ranch"; collectively, the "Subsidiary Debtors," and together with the Parent Debtor, the "Debtors") submits this omnibus opposition (the "Opposition") to the *Motions for Relief From the Automatic Stay Under 11 U.S.C. § 362* (the "Lehman Relief Motions") filed by Lehman Commercial Paper, Inc. ("Lehman Commercial"), and submits the following memorandum of points and authorities, and the declarations of Alfred H. Siegel, Howard Grobstein, Evan D. Smiley, and Larry Wasbin, MAI, filed separately in support, and respectfully represents as follows:

**I. INTRODUCTION**

Lehman Commercial is not entitled to relief from the automatic stay. The amount and validity of Lehman Commercial's security interests are in dispute, and Lehman Commercial failed to establish a *prima facie* case for relief. More specifically, Lehman Commercial is not entitled to relief from the automatic stay and the Lehman Relief Motions should be denied for the following reasons:

1. Lehman Commercial's pre-petition inequitable conduct entitles the Trustee to subordinate and disallow Lehman Commercial's claims and/or avoid and preserve Lehman Commercial's security interests;
2. Lehman Commercial has failed to establish a *prima facie* case for relief from the automatic stay as it failed to prove the amount of its claim and Debtors' lack of equity in Lehman Commercial's collateral;
3. Lehman Commercial's collateral is valuable to the estates, and undisputedly necessary for an effective reorganization;
4. Lehman Commercial has acted in bad faith by refusing to stipulate to relief from the automatic stay in its own bankruptcy case to allow the Trustee to adequately defend these estates against the Lehman Relief Motions; and

1           5.       Lehman Commercial failed to properly notice the Lehman Relief Motions,  
2                   and on that basis alone, the Lehman Relief Motions should be denied, or at  
3                   a minimum, continued for proper notice.

4           First, Lehman Commercial's security interests are in dispute. Lehman  
5 Commercial's pre-petition inequitable conduct entitles the Trustee to *entirely* subordinate  
6 and disallow its claims and/or avoid its liens as fraudulent transfers and preserve the  
7 same for the benefit of the estates. Lehman Commercial used its position as a lender and  
8 affiliate of LBREP<sup>1</sup> Lakeside SC Master I, LLC ("Lehman Lakeside"), the 90% owner and  
9 managing member of the Parent Debtor, to strip the Debtors of substantial cash and  
10 equity, leaving general unsecured creditors unpaid. Lehman Commercial caused the  
11 Debtors to incur \$320 million of secured debt, without paying the Debtors a substantial  
12 portion of the purported loan proceeds. For example, \$144 million of Lehman  
13 Commercial's alleged financing was paid directly to the Parent Debtor's equity owners, of  
14 which \$117 million was paid to Lehman Lakeside. The Subsidiary Debtors were forced to  
15 guarantee the \$320 million in loans, grant security interests in their respective real estate  
16 developments to secure the guarantees, and use \$44.3 million of *their own cash* to repay  
17 the loans when they received virtually no value in return. Moreover, through collusive  
18 negotiations, the Debtors submitted to unreasonable amendments to the applicable loan  
19 documents, which essentially sealed the Debtors' financial demise. In sum, Lehman  
20 Commercial's inequitable conduct caused substantial harm to creditors, and resulted in  
21 the Debtors incurring \$320 million in secured debt, for which the Debtors did not receive  
22 reasonable equivalent value in return.

23           Second, Lehman Commercial has failed to establish a *prima facie* case for relief.  
24 Even assuming the appraisals submitted by Lehman Commercial are credible and not  
25

26           <sup>1</sup> LBREP stands for Lehman Bros. Real Estate Partnership, LP, the entity that owns LBREP Lakeside  
27 SC Master 1, LLC. Lehman Commercial and Lehman Bros. Real Estate Partnership, LP are under common  
28 control.



1 outdated, which the Trustee does not concede, Lehman Commercial has failed to  
2 demonstrate that the amount owed by the Subsidiary Debtors exceeds the appraised  
3 values. Lehman Commercial's claims against the Subsidiary Debtors are based on  
4 written guarantees, which contain a provision expressly limiting the Subsidiary Debtors'  
5 liability by fraudulent transfer law.<sup>2</sup> Each guarantee limits the Subsidiary Debtor's liability  
6 to an amount that *does not* constitute a fraudulent transfer. Thus, to prove the amount of  
7 its claim, Lehman Commercial must prove the amount that applicable fraudulent transfer  
8 laws will permit. Because Lehman Commercial has not proven the amount of debt  
9 guaranteed by each Subsidiary Debtor, it cannot show the amount of the corresponding  
10 liens or the lack of equity in the collateral.

11 Assuming Lehman Commercial can prove the amount of its claim, Lehman  
12 Commercial is, at best, undersecured and, therefore, not entitled to adequate protection  
13 absent evidence that its collateral is *currently* declining in value. However, Lehman  
14 Commercial has failed to provide any evidence that its collateral is currently declining in  
15 value, but instead relies on appraisals that are approximately 8 months old. In contrast,  
16 the Trustee's appraiser testifies that residential land values in the areas of the subject real  
17 estate developments have not materially declined since the petition dates. Moreover, the  
18 value of the collateral is arguably increasing in value due to the Trustee's payment of  
19 essential expenses related thereto,<sup>3</sup> and the protections afforded by the Bankruptcy Code.

20 Third, the subject real property and other collateral are valuable and undisputedly  
21 necessary for a reorganization of these estates. The Trustee can confirm a plan in these  
22 cases. Based on the estates' claims against Lehman Commercial, Lehman Lakeside, and  
23 other Lehman-related entities, the Trustee expects to be successful in either recasting

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24  
25 <sup>2</sup> This clause implies that Lehman Commercial knew that the very issues now raised by the Trustee  
were issues back in January, 2006.

26 <sup>3</sup> Fortunately, these estates own approximately \$18 million in available cash. Accordingly, the  
27 Trustee has the ability, subject to approval of this Court, to maintain and preserve estate property pending  
further developments in these bankruptcy cases.

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1 Lehman Commercial's secured claim or extinguishing its lien and avoiding and preserving  
2 such lien for the benefit of the estates. The Trustee can then use the estates' property to  
3 fund a chapter 11 plan and make a meaningful distribution to creditors. Importantly, as  
4 Lehman Commercial and other Lehman-related entities are bankrupt, the only recovery  
5 for Lehman Commercial's wrongful acts (at least in the short term) will come from the  
6 preservation of its liens against the real estate developments and other collateral. The  
7 collateral at issue is not depreciating in value and the Trustee will continue to preserve the  
8 value of estate property through the use of cash collateral. Thus, the Trustee should be  
9 afforded the opportunity to pursue its claims against Lehman Commercial and a plan that  
10 maximizes the value for the estates for all creditors.

11 Fourth, Lehman Commercial has acted in bad faith in refusing to agree to stay  
12 relief in its own pending bankruptcy case. Lehman Commercial is hiding behind the  
13 automatic stay in its chapter 11 case to prevent the Trustee from being able to properly  
14 defend against the Lehman Relief Motions. The Trustee is prepared to file the complaint  
15 attached as Exhibit "A" to his declaration, and to conduct discovery related to the Lehman  
16 Relief Motions, but cannot do so without relief from stay in Lehman Commercial's  
17 bankruptcy cases. Lehman Commercial will not, however, agree to stipulate to such stay  
18 relief. In light of Lehman Commercial's refusal to "level the playing field" and the Trustee's  
19 consequent inability to defend the estates from the Lehman Relief Motions, the Court  
20 should deny Lehman Commercial the relief sought by the Lehman Relief Motions.

21 Fifth, Lehman Commercial failed to properly notice the Lehman Relief Motions at  
22 the time they were filed, and on that basis alone, the Lehman Relief Motions should be  
23 denied, or at a minimum, continued for proper notice.

24 For all these reasons, the Trustee respectfully requests that the Court deny the  
25 Lehman Relief Motions.  
26  
27  
28

1 **II. BACKGROUND**

2 **A. General Background**

3 On or about September 10 and 11, 2008 (the "Petition Dates"), involuntary petitions  
4 under chapter 11 of the Bankruptcy Code were filed against the Debtors.<sup>4</sup> The Debtors'  
5 bankruptcy cases are being jointly administered pursuant order of this Court entered on  
6 November 13, 2008.

7 The Parent Debtor is a holding company, established to the fund the real estate  
8 development projects owned by each of its four operating subsidiaries, *i.e.*, McAllister  
9 Ranch, McSweeny Farms, Summerwind Ranch, and LBREP/L-SunCal Patterson Ranch  
10 ("Patterson Ranch"). The Parent Debtor is controlled by Lehman Lakeside, which is an  
11 affiliate of Lehman Commercial (*i.e.*, the movant on the Lehman Relief Motions) and a  
12 subsidiary of Lehman Bros. Real Estate Partners, LP ("LBREP"). More specifically,  
13 Lehman Lakeside is the *managing member* and 90% equity owner of the Parent Debtor.  
14 The remaining equity interests in the Parent Debtor are owned by SCC Ranch Venture,  
15 LLC, which is an affiliate of SCC Acquisitions, Inc. d/b/a SunCal Companies (collectively,  
16 "SCC").

17 The Parent Debtor's primary asset, other than cash, is its interest in its operating  
18 subsidiaries. The Parent Debtor is the sole equity member of McAllister Ranch,  
19 McSweeny Farms, and Summerwind Ranch, each of which, in turn, owns a real estate  
20 development project bearing the same name (collectively, the "Developments").<sup>5</sup> Lehman  
21

22 <sup>4</sup> The Debtors' involuntary bankruptcy cases were commenced only after the Debtors failed to initiate  
23 their own bankruptcy proceedings or take any other action to protect themselves and creditors against  
24 Lehman Commercial's impending foreclosure sales. While the Trustee continues to investigate the reasons  
25 why the Debtors failed to initiate their own bankruptcy cases, the Declaration of Bruce Cook dated  
26 November 7, 2008 in certain related bankruptcy cases indicates that Lehman Lakeside, as the managing  
27 member of the Debtors, may have prevented the efforts of SCC Acquisitions, Inc., the Parent Debtor's  
28 minority owner, to protect these estates. A true and correct copy of the Declaration of Bruce V. Cook is  
attached to the Trustee's Request for Judicial Notice as Exhibit "L."

<sup>5</sup> The Parent Debtor is also the sole equity member of Patterson Ranch, which owns the "Borchard  
Patterson" real estate development project in Ventura County, California.

Commercial asserts a lien against each of the three real estate developments for the full amount of the loans to the Parent Debtor. The following is a brief summary of the Developments:

**1. McAllister Ranch**

McAllister Ranch owns the real estate development project commonly known as "McAllister Ranch," which is located near Bakersfield in Kern County, California. The Trustee understands that McAllister Ranch is designed to be a 2,070 acre master-planned community featuring a golf course, lake, and approximately 6,087 homes. All of the lots have been graded, and the first of five planned subdivisions is nearly complete. In addition, the golf course is completed and the clubhouse is framed and roofed.

**2. McSweeney Farms**

McSweeney Farms owns the real estate development project commonly known as "McSweeney Farms," which is located near Hemet in Riverside County, California. McSweeney Farms is comprised of 673 acres, and a total of 1,640 lots are planned to be included thereon. Phase 1 of the project has been completed and sold out. Contrary to the assertions of Lehman Commercial in the Lehman Relief Motions, hundreds of homes have been completed, and there are residents living in a substantial number of these homes.

**3. Summerwind Ranch**

Summerwind Ranch owns the real estate development project commonly known as "Summerwind Ranch," which is located near Calimesa in Riverside County, California. Summerwind Ranch is comprised of 2,591 acres with 3,683 lots planned thereon.

**B. Significant Post-Petition Events**

On October 2, 2008, Lehman Commercial filed four motions for relief from the automatic stay, one in each individual case (*i.e.*, the Lehman Relief Motions), which were

1 originally scheduled for hearings on October 28, 2008.<sup>6</sup> On October 14, 2008, a group of  
2 petitioning creditors filed an opposition to the Lehman Relief Motions. Not surprisingly,  
3 the Debtors, controlled by Lehman Lakeside, did not oppose the Lehman Relief Motions.

4 Following the Debtors' refusal to oppose the Lehman Relief Motions, on or about  
5 October 15, 2008, a group of petitioning creditors filed a motion for order authorizing the  
6 appointment of a chapter 11 trustee (the "Trustee Appointment Motion"). The petitioning  
7 creditors argued that an independent trustee should be appointed to represent the  
8 interests of the Debtors' estates, especially in light of the affiliate relationship between  
9 Lehman Commercial, the lender and movant, and Lehman Lakeside, the managing  
10 member and majority owner of the Parent Debtor.

11 On October 22, 2008, the Debtors answered the involuntary petitions, consented to  
12 the entry of the orders for relief, and then filed motions to convert the cases from chapter  
13 11 to chapter 7 (collectively, the "Motions to Convert"). The Debtors, controlled by  
14 Lehman Lakeside, argued that conversion was proper because there was no possibility to  
15 reorganize.<sup>7</sup> Both Lehman Commercial and the Lehman-controlled Debtors opposed the  
16 Trustee Appointment Motion.

17 On October 28, 2008, the Court heard the Trustee Appointment Motions, the  
18 Debtors' Motions to Convert, and the Lehman Relief Motions. The Court entered the  
19 orders for relief, granted the Trustee Appointment Motion, and denied the Motions to  
20 Convert. The Lehman Relief Motions were continued to November 20, 2008, to give the  
21 Trustee time to analyze the Trustee's position with respect thereto. On or about  
22 October 29, 2008, the order approving Alfred H. Siegel's appointment as the chapter 11  
23 trustee was entered.

24  
25 <sup>6</sup> Since these cases are jointly administered, the Trustee has filed one omnibus opposition to the  
Lehman Relief Motions.

26 <sup>7</sup> Interestingly, while Lehman Commercial would not consent to the Debtors use of funds to to  
27 preserve and and maintain the Developments, it authorized the disbursement of \$100,000 to fund the  
Debtors' bankruptcy counsel's retainer.

Following his appointment, the Trustee immediately moved the Court for authority to use cash collateral on an emergency basis (the "Cash Collateral Motion"). Lehman Commercial opposed the Cash Collateral Motion, despite the fact that the Trustee sought Court authority to use the cash in the Development Account<sup>8</sup> for the sole purpose of preventing the neglect of the Developments complained of in the Lehman Relief Motions. (See Lehman Commercial's Mem. of P. & A. at 12, ¶ 26.) On November 6, 2008, the Court heard and approved the Cash Collateral Motion over Lehman Commercial's objection. Pursuant to the Court's order, the Trustee has authority to use the funds in the Development Account pursuant to the Court-approved budget to pay the expenses necessary to preserve the value of the Developments.

In the short time since his appointment, the Trustee and his professionals have spent considerable time investigating the pre-petition financial affairs, assets, and liabilities of the Debtors, including the Debtors' pre-petition transactions with Lehman Commercial. While the Trustee is still conducting his investigation, the Trustee has uncovered numerous issues with respect to the loans by Lehman Commercial to the Parent Debtor, which form the bases for the Lehman Relief Motions. The following is a more detailed discussion of the Trustee's findings:<sup>9</sup>

**C. Disbursement of the Lien Credit Agreement Proceeds**

As this Court is now aware, the Parent Debtor, as borrower, entered into three Lien Credit Agreements with Lehman Commercial (collectively, the "Lien Credit Agreements").

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<sup>8</sup> All capitalized terms not specifically defined herein shall have the same meaning as in the Lehman Relief Motions.

<sup>9</sup> Given that the Trustee has only been involved these cases since October 29, 2008, no 341(a) hearing has been held, Lehman Commercial is hiding behind the automatic stay in its own Lehman Brothers cases and not providing information, and the SunCal Management has been short-staffed and apparently in its own conflicts with Lehman Commercial, the Trustee's information is not complete as of this date. However, he has been provided certain financial data by SunCal Management, creditors in the cases and from pleadings filed. The Trustee's investigation is continuing.

1 Pursuant to the First and Second Lien Credit Agreements, which were entered into on or  
2 around January 19, 2006, the Parent Debtor borrowed a total of \$320 million (collectively,  
3 the "January 2006 Loans") as follows: (1) a revolving credit facility of \$75 million and term  
4 loan facility of \$160 million under the First Lien Credit Agreement; and (2) a \$85 million  
5 term loan facility under the Second Lien Credit Agreement. Lehman Commercial  
6 participated in the January 2006 Loans, and acted as the sole administrative agent, and  
7 Lehman Brothers, Inc. ("Lehman Brothers"), served as the sole lead arranger and  
8 syndicator. The Parent Debtor's obligations under these agreements were guaranteed by  
9 the Subsidiary Debtors, and these upstream guaranties were secured by first and second  
10 liens against the Developments.

11 Despite the fact that the Debtors were collectively saddled with \$320 million in  
12 secured debt and the significant interest accruing thereon, the Debtors did not receive a  
13 substantial portion of these purported borrowings. Importantly, of the \$235 million  
14 allegedly loaned to the Parent Debtor under the First Lien Credit Agreement, \$144 million  
15 was paid from escrow to the Parent Debtor's equity owners, of which \$117 million was  
16 paid to Lehman Lakeside. The Subsidiary Debtors were forced to grant security interests  
17 in the Developments to secure the entire \$320 million in loans to the Parent Debtor,  
18 despite the fact that each entity received only a fraction of the loan proceeds. Moreover,  
19 the Subsidiary Debtors were forced to *contribute* cash to repay the loans. The following is  
20 a brief summary of the Trustee's findings regarding each Debtor Subsidiary:

21 1. McAllister Ranch: In exchange for securing the entire \$320 million in loans to  
22 the Parent Debtor, McAllister Ranch received only \$20 million in loan proceeds, all of  
23 which was used to replace the existing \$20 million first position lien (plus accrued  
24 interest), which was allegedly created on November 5, 2004 and held by another  
25 Lehman-related entity, plus some real property taxes in relatively small amounts.  
26 Moreover, in March 2006, approximately \$22.7 million in cash from McAllister Ranch's  
27 account was effectively paid to Lehman Commercial on account of the January 2006  
28 Loans.

1           2.     McSweeney Farms: In exchange for securing the entire \$320 million in loans  
2 to the Parent Debtor, McSweeney Farms received loan proceeds of \$17.7 million, all of  
3 which was used to replace the existing \$17.7 million first position lien (plus accrued  
4 interest), which was allegedly created on May 18, 2005, and held by another  
5 Lehman-related entity, plus some real property taxes in relatively small amounts.  
6 Moreover, McSweeney Farms *paid* approximately \$21.5 million into escrow prior to the  
7 closing of the January 2006 Loans, which was presumably paid to Lehman Commercial.

8           3.     Summerwind Ranch: In exchange for securing the entire \$320 million in  
9 loans to the Parent Debtor, Summerwind Ranch LLC received only loan proceeds  
10 sufficient to replace the existing \$24 million first position lien (plus accrued interest), which  
11 was allegedly created on May 3, 2005, and held by another Lehman-related entity, plus  
12 some real property taxes in relatively small amounts.

13           In sum, the only concrete economic benefit received by the Subsidiary Debtors in  
14 exchange for securing the Parent Debtor's obligations under First and Second Lien Credit  
15 Agreements (*i.e.*, the repayment of the \$320 million in loans), and repaying a portion of  
16 the January 2006 Loans, was funds sufficient to simply replace existing secured  
17 obligations to another Lehman-related entity, in amounts far less than that guaranteed by  
18 the Subsidiary Debtors and secured by the Developments. The apparent flow of funds  
19 demonstrates Lehman Commercial's scheme to maximize its own yield, while minimizing  
20 the cash actually paid to the Debtors. Clearly, the Subsidiary Debtors did not receive  
21 reasonably equivalent value.

22           On February 6, 2007, a Third Lien Credit Agreement was entered into by the  
23 Parent Debtor, which allegedly provided for an additional \$75 million term loan,  
24 guaranteed again by the Subsidiary Debtors and secured by third priority liens against the  
25 Developments. Just as with the January 2006 Loans, Lehman Commercial participated  
26 and served as the administrative agent, and Lehman Brothers served as sole arranger  
27 and syndicator. It appears that the Parent Debtor entered into the Third Lien Credit  
28 Agreement due to cash flow shortages and pressure by Lehman Commercial to repay the



1 Parent Debtor's obligations to Lehman Commercial under the First Lien Credit Agreement.  
2 From the \$75 million loaned to the Parent Debtor under the Third Lien Credit Agreement,  
3 \$50 million was paid out of escrow directly to Lehman Commercial to pay down the  
4 obligations under the First Lien Credit Agreement.

5  
6 **D. The Defaults Under the Lien Credit Agreements, and the Fourth**  
7 **Amendment and the Waiver**

8 According to Lehman Commercial, "In January 2008, the First Lien Agent, Second  
9 Lien Agent and Third Lien Agent commenced negotiations that may have obviated the  
10 need for the First Lien Lenders' foreclosure sales." (See Lehman Commercial's Mem. of  
11 P. & A. at 10, ¶ 22.) However, the Trustee understands that in January, 2008, Lehman  
12 Commercial was still the administrative agent under all three Lien Credit Agreements.  
13 Thus, Lehman Commercial must have commenced negotiations with itself on behalf of all  
14 three creditor groups, and with its affiliate, Lehman Lakeside, as the managing member of  
15 the Parent Debtor. Lehman Commercial did not resign its position as administrative agent  
16 under the Second and Third Lien Credit Agreements until February 14, 2008. However, in  
17 a parting act, it appears that Lehman Commercial negotiated on behalf of all three lending  
18 groups yet another set of self-serving agreements with the Debtors.

19 Those negotiations between Lehman Commercial and Lehman Lakeside  
20 essentially set the Debtors up for their ultimate demise. On January 31, 2008, Lehman  
21 Commercial, as the lien agent for all three Lien Credit Agreements, negotiated the Fourth  
22 Amendment and Waiver to the First Lien Credit Agreement (the "Amendment"), which  
23 required that the cash in the Development Account be *increased* from \$25 million to \$50  
24 million by March 31, 2008. (See Lehman Commercial's Mem. of P. & A. at 10 n.13.)  
25 Then, 60 days later, on March 31, 2008, Lehman Commercial declared a default due to  
26 the Debtors' failure to increase the amount of funds deposited in the Development  
27 Account. The Trustee believes that Lehman Commercial knew or reasonably should have

1 known that the Debtors would be unable to comply with the Amendment and come up with  
2 an additional \$25 million in cash in 60 days.

3 The other defaults declared by Lehman Commercial are equally suspect. Lehman  
4 Commercial argues that the Debtors missed an interest payment, even though there was  
5 approximately \$25 million of cash in the Development Account, which was admittedly  
6 available to repay and prepay loans. (See Lehman Commercial's Mem. of P. & A. at 10  
7 n.14.) Lehman Commercial argues that the Debtors failed to timely deliver financial  
8 statements when the Debtors were under the control of Lehman Commercial's affiliate,  
9 Lehman Lakeside. Lehman Commercial further asserts that the Debtors failed to pay a  
10 \$100,000 administrative fee and maintain the necessary liquidity requirements, which was  
11 presumably caused by that fact that \$144 million of the loan under the First Lien Credit  
12 Agreement was paid directly from escrow to the Parent Debtor's owners and, primarily,  
13 Lehman Lakeside.

14 The Trustee is still investigating other issues related to the pre-petition transactions  
15 with Lehman Commercial, including the following:

- 16 1. Why Lehman Commercial funded only \$50 million of the \$75 million  
17 revolving lien of credit provided for under the First Credit Agreement,  
18 between January, 2006, and February, 2007, which effectively deprived the  
19 Parent Debtor of the additional liquidity needed to meet its obligations;
- 20 2. Why Lehman Commercial required the Parent Debtor to maintain \$25 million  
21 in the Development Account, which was supposedly available to repay the  
22 loans and to fund certain expenses, and then restricted the Debtors' access  
23 to that account, effectively freezing these funds and further diminishing the  
24 Debtors' available capital and liquidity, despite the fact that the Debtors were  
25 required to pay interest on those funds;
- 26 3. Whether the approximately \$10.6 million in transactional fees and costs  
27 generated by Lehman Brothers and its affiliates was reasonable; and  
28

4. Whether the payment of approximately \$5.7 million in loan proceeds from the Lien Credit Agreements to Patterson Ranch benefited the Subsidiary Debtors.

In sum, the Trustee and his professionals have expended significant resources during an extremely abbreviated time frame investigating the facts and circumstances of these cases and, especially, the Debtors' transactions with Lehman Commercial, and much investigation still needs to be done. However, the Trustee has concluded that the Lehman Relief Motions should be denied in their entirety. Moreover, as discussed in further detail below, the estates have viable claims for equitable subordination, fraudulent transfer, and breach of fiduciary duty against Lehman Commercial, Lehman Lakeside and other Lehman-related entities, that far exceed the value of the collateral at issue in these cases.

### III. ARGUMENT

#### A. The Amount and Validity of Lehman Commercial's Security Interests are Subject to a Bona Fide Dispute

Numerous courts, including the Ninth Circuit, hold that, on a motion for relief from the automatic stay, a court should consider affirmative defenses and counterclaims that directly involve the validity of a movant's security interest and/or the debtor's equity in the property, or that would be eliminated if relief from the automatic stay is granted. *See In re Bialac*, 694 F.2d 625, 627 (9th Cir. 1982); *see also In re Poughkeepsie Hotel Assoc. Joint Venture*, 132 B.R. 287, 291 (Bankr. S.D.N.Y. 1991); *In re Kaplan Breslaw Ash, LLC*, 264 B.R. 309, 327 (Bankr. S.D.N.Y. 2001); *In re Mr. R's Prepared Foods, Inc.*, 251 B.R. 24, 28 (Bankr. D. Conn. 2000). More specifically, courts have considered whether the moving creditor's secured claim is subject to equitable subordination, or whether the creditor's security interest constitutes an avoidable transfer in determining whether to grant a creditor relief from the automatic stay. *See, e.g., In re Poughkeepsie Hotel Assoc. Joint Venture*, 132 B.R. at 292-93.

Here, the validity and amount of Lehman Commercial's security interests, and the estates' equity in the Developments are in dispute. Due to Lehman Commercial's pre-petition misconduct, the estates are entitled to subordinate, avoid and preserve Lehman Commercial's liens for the benefit of estate creditors. Moreover, the Debtors did not receive reasonably equivalent value in exchange for granting Lehman Commercial a security interest securing the entire \$320 million in loans under the Lien Credit Agreements, and the Debtors were insolvent at the time of the transfers. If the Trustee prevails on its claims against Lehman Commercial, then the substantial value in the Developments and the cash in the Development Account will be made available (essentially creating equity) for the benefit of the bankruptcy estates.

**1. Lehman Commercial's Secured Claims are Subject to Equitable Subordination, and the Liens Securing Those Claims Should be Transferred to the Estate**

It is well-settled that "bankruptcy courts exercise broad equitable power to subordinate claims." *See In re Universal Farming Industries*, 873 F.2d 1334, 1337 (9th Cir. 1989). Pursuant to § 510(c), the bankruptcy court may "(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim. . .; or (2) order that any lien securing such a subordinated claim be transferred to the estate." 11 U.S.C. § 510(c). A lien transferred pursuant to 11 U.S.C. § 510(c)(2), is preserved for the benefit of the estate, such that the trustee steps into the shoes of the subordinated creditor, thereby preventing junior lien holders from improving their position. *See In the Matter of Pat Freeman, Inc.*, 42 B.R. 224, 231-232 (Bankr S.D. Ohio 1984); *see also* Chobot, John C., Preserving Liens in Bankruptcy-Limitations and Applications, 62 Am. Bankr. L.J. 149, 157 (1988).

Equitable subordination generally requires the three following findings: " (1) that the claimant engaged in some type of inequitable conduct; (2) that the misconduct injured creditors or conferred unfair advantage on the claimant; and (3) that the subordination would not be inconsistent with the Bankruptcy Code." *In re First Alliance Mortg. Co.*, 471

1 F.3d 977, 1007 (9th Cir. 2006). The inequitable conduct justifying equitable subordination  
2 need not arise from the acquisition or assertion of the claim sought to be subordinated.  
3 *See In re Pacific Exp., Inc.*, 69 B.R. 112, 116 (9th Cir. B.A.P. 1986). Moreover, where, as  
4 here, the claimant is an insider, the party requesting equitable subordination is subject to  
5 a lesser burden of proof and pleading.

6 Where the claimant is an insider, his dealings with the debtor  
7 will be subjected to more exacting scrutiny. If the objectant  
8 comes forward with sufficient substantiations of misconduct on  
9 the part of the insider claimant, the burden will shift to the  
insider to establish that each of his challenged transactions  
with the debtor had all the earmarks of an arm's length  
bargain.

10 *In re Pacific Exp., Inc.*, 69 B.R. 112, 116 -17 (9th Cir. B.A.P. 1986); *see also Pepper v.*  
11 *Litton*, 308 U.S. 295, 306 (1939) (dealings with insiders are subject to "rigorous scrutiny"  
12 and the insider must prove that the subject transactions were in good faith and inherently  
13 fair to the debtor and interested parties).

14 "The courts have recognized three general categories of conduct considered  
15 sufficient to warrant equitable subordination: (1) fraud, illegality, breach of fiduciary duties;  
16 (2) undercapitalization; and (3) claimant's use of the debtor as a mere instrumentality or  
17 alter ego." *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206, 212  
18 (5th Cir. 1983). Moreover, bankruptcy courts have recognized that subordination is proper  
19 where a lender exercises control over the borrower to the detriment of other creditors or to  
20 gain an unfair advantage. *See, e.g., In re American Lumber Co.*, 5 B.R. 470, 478 (D.C.  
21 Minn. 1980); *See also In re T. E. Mercer Trucking Co.*, 16 B.R. 176, 189-90 (Bankr. Tex.  
22 1981).

a. Lehman Commercial is an Insider and, Therefore, its  
Transactions with the Debtors are Subject to a More Exacting  
Level of Scrutiny

Lehman Commercial is a *per se* or statutory insider.<sup>10</sup> Pursuant to 11 U.S.C. § 101(31), the term "insider" includes an affiliate, or insider of an affiliate. The term "affiliate" means any entity that "directly or indirectly owns, controls or holds" 20% or more of the ownership interests in the debtor. *See 11 U.S.C. § 101(2)*. Lehman Lakeside, directly or indirectly, owns 90% of the equity interests in the Debtors and, therefore, is an affiliate of the Debtors. Lehman Commercial is admittedly an affiliate of Lehman Lakeside.<sup>11</sup> As an affiliate of Lehman Lakeside, Lehman Commercial is an "insider of an affiliate" and thus, and insider of the Debtors. For this reason, Lehman Commercial's non-arm's length dealings with the Debtors are subject to a more exacting level of scrutiny. *See In re Pacific Exp., Inc.*, 69 B.R. at 116 -17.

b. Lehman Commercial Used its Position as an Insider to Gain an  
Unfair Advantage, and to the Detriment of Creditors

Lehman Commercial used its position as an insider to gain an unfair advantage and to the detriment of other creditors. Lehman Commercial caused the Parent Debtor to fictitiously borrow \$320 million, plus interest, on a secured basis, without paying the Debtors a substantial portion of the purported loan proceeds. As discussed above, \$144

<sup>10</sup> There are two types of insiders, those entities included in the Bankruptcy Code (*per se* insiders), and those not listed in the Bankruptcy Code's definition of insider, "but who have a . . . sufficiently close relationship with the debtor that . . . conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor. " *See In re Enterprise Acquisition Partners, Inc.*, 319 B.R. 626, 631 (9th Cir. B.A.P. 2004) (internal citations and quotation marks omitted).

<sup>11</sup> Indeed, Lehman Commercial recognized these "affiliate" relationships and potential problems when the \$235 million loan was funded which is reflected in the Agreement Regarding Debtor/Creditor Relationship ("Affiliate Relationship Agreement"), a true and correct copy of which is attached to the Trustee's Request for Judicial Notice as Exhibit "I." In the Affiliate Relationship Agreement, it provides at paragraph E that Lehman Lakeside (the 90% equity holder of Lehman/Lehman SunCal Master) is an affiliate of Lehman Commercial and that Lehman Commercial is concerned at a later date that third parties might attempt to assert claims against Lehman Commercial. At paragraph D, the Affiliate Relationship Agreement provides that "a dividend" will be paid to "certain investors" from the loan proceeds. In these chapter 11 cases, Lehman Commercial ironically attempts to distance itself from these "affiliate" relationships.

1 million of the January 2006 Loan proceeds was unnecessary, funded solely to pay a  
2 dividend to the Parent Debtor's owners and primarily Lehman Lakeside. Similarly, the  
3 Subsidiary Debtors were required to guaranty the loans to the Parent Debtor, secure the  
4 entire \$320 million obligation with the Developments, and pay \$44.3 million of their own  
5 cash to Lehman Commercial, for little to no value in return. In short, Lehman Commercial  
6 created a scheme to maximize its own yield (*i.e.*, a return of \$320 million, plus  
7 interest) and obtain a security interest in the Debtors' accounts and real property, while  
8 minimizing the cash actually paid to the Debtors.

9       Lehman Commercial also caused the Debtors' default. Lehman Commercial forced  
10 the Debtors (presumably through negotiations with Lehman Lakeside) to accept the  
11 Amendment, and increase the amount required to be deposited in the Development  
12 Account by \$25 million, which the Debtors clearly could not do. Moreover, Lehman  
13 Commercial prevented the Debtors from using the funds in the Development Account to  
14 pay the necessary expenses associated with the Developments, causing an unnecessary  
15 decline in the value of the Debtors' primary assets. Lehman Commercial declared a  
16 default based on reasons which were either due to its own conduct or within the control of  
17 its affiliate Lehman Lakeside. Lehman Commercial's inequitable control is further  
18 demonstrated by the Debtors' refusal to defend themselves and the estates in these  
19 proceedings. Instead, the Debtors, managed by Lehman Lakeside, conceded to relief  
20 from the automatic stay and Lehman Commercial's foreclosure efforts to exclusion of all  
21 other creditors.

22                   c.     Lehman Commercial's Inequitable Conduct Substantially  
23                             Harmed Creditors

24       The harm caused to creditors by Lehman Commercial's inequitable conduct is  
25 clear. Lehman Commercial caused the Debtors' financial demise. Lehman Commercial's  
26 conduct saddled the Debtors with \$320 million of unnecessary secured debt, plus interest,  
27 without providing the Debtors with the benefit of those funds. Again, \$144 million of the  
28 \$320 million borrowed by the Parent Debtor was immediately disbursed from escrow to its

1 owners, and primarily Lehman Lakeside. The interest on the \$160 million term loan under  
2 the First Lien Credit Agreement, \$144 million of which the Debtors did not receive, alone  
3 cost the Debtors approximately \$35 million. (See Declaration of Howard Grobstein at 6,  
4 ¶ 11.) The funds paid directly to the Parent Debtor's owners could have been used to  
5 develop the properties, or prevent default under the Lien Credit Agreements. Moreover,  
6 approximately \$44.3 million in cash was effectively paid from the Subsidiary Debtors to  
7 Lehman Commercial for debt service on the January 2006 Loans, leaving millions of  
8 dollars in project-level creditors unpaid.

9 In sum, Lehman Commercial used its insider position to create an arrangement  
10 where it could obligate the Debtors to repay it \$320 million and obtain a lien against the  
11 Developments securing the same, without paying the Debtors a substantial portion of the  
12 alleged loan proceeds and restricting the use of certain other substantial funds. Lehman  
13 Commercial's conduct saddled the Debtors with \$320 million in secured debt, which it  
14 could not repay, caused the dissipation of cash for its own benefit (and for the benefit of  
15 its affiliate, Lehman Lakeside), and ultimately bankrupted the Debtors. Lehman  
16 Commercial used its fictitious loan arrangement to strip the Debtors of substantial cash  
17 and equity, leaving millions of dollars in creditors unpaid. Certainly, under these  
18 circumstances, equitable subordination is appropriate and wholly consistent with the  
19 Bankruptcy Code. *See In re Mid-American Waste Systems, Inc.*, 284 B.R. 53, 68 (Bankr.  
20 D. Del. 2002) ("The essential purpose of equitable subordination is to undo any inequality  
21 in the claim position of a creditor that will produce injustice or unfairness to other creditors  
22 in terms of distribution of the estate."). Accordingly, the Trustee clearly has a viable claim  
23 to equitably subordinate all the claims arising under the First Credit Agreement and relief  
24 from stay should be denied.

## 25 2. Lehman Commercial's Security Interests Constitute Fraudulent 26 Transfers

27 Generally speaking, under either the Bankruptcy Code or California law, a transfer  
28 of property or an obligation incurred is constructively fraudulent and, thus, avoidable if the



1 debtor did not receive reasonably equivalent value in return, and the debtor was insolvent  
2 or undercapitalized at the time of the transfer or obligation. *See* 11 U.S.C. § 548; *see also*  
3 Cal. Civ. Code §§ 3439.04(a)(2), 3439.05. Section 551, in turn, preserves an avoidable  
4 transfer for the benefit of the estate. With respect to avoided liens, § 551 "operates to  
5 preserve an avoided lien for the benefit of the bankruptcy estate so as to permit the  
6 trustee to step into the position of the creditor whose lien has been avoided, thereby  
7 preventing a junior lien holder (or a debtor) from improving its position at the expenses of  
8 a debtor's unsecured creditors." *In re Seibold*, 351 B.R. 741, 746 (Bankr. D. Idaho 2006);  
9 *see also In re Van de Kamp's Dutch Bakeries*, 908 F.2d 517, 519 (9th Cir. 1990) (stating  
10 that § 551 "prevents junior lienors from improving their position at the expense of the  
11 estate when a senior lien is avoided." (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 91  
12 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5877)).

13 Here, the Debtors did not receive reasonably equivalent value in exchange for  
14 incurring the obligation to pay Lehman Commercial \$320 million and granting Lehman  
15 Commercial a security interest to secure the repayment of that obligation. The Parent  
16 Debtor "borrowed" \$320 million on a secured basis, but did not receive \$320 million in  
17 return. The sum of \$144 million of the borrowed funds was paid directly from escrow to  
18 the Parent Debtor's owners, and the Parent Debtor was provided access to only \$50  
19 million (as opposed to \$75 million) on the revolving line of credit provided under the First  
20 Lien Agreement. Thus, the Parent Debtor received substantially less than the \$320  
21 million incurred.

22 The Subsidiary Debtors similarly did not receive reasonably equivalent value. Each  
23 of the Subsidiary Debtors granted Lehman Commercial a security interest in each of their  
24 respective Developments to secure the entire amount of the loans to the Parent Debtor  
25 (\$320 million), but received only a small fraction of the loan proceeds. McAllister Ranch,  
26 McSweeny Farms, and Summerwind Ranch received only \$20 million, \$17.7 million, and  
27 \$24 million, respectively, in exchange for liens securing \$320 million. Moreover, certain of  
28

1 the Subsidiary Debtors were forced to effectively pay approximately \$40 million to Lehman  
2 Commercial in repayment of the January 2006 Loans.

3 In sum, the January 2006 Loans were not an even or reasonable exchange of  
4 value. The Debtors obligated themselves to pay \$320 million and granted Lehman  
5 Commercial security interests to secure the repayment of those obligations. However, the  
6 Debtors actually received far less than \$320 million and, therefore, did not receive  
7 reasonably equivalent value in exchange for the transfers of property and the obligations  
8 incurred. The Trustee believes that he can prove that the Debtors were insolvent at the  
9 time of the transfers pursuant to the applicable definitions of insolvency, including  
10 undercapitalization. Accordingly, Lehman Commercial's liens against the Development  
11 Accounts and the Developments can be avoided as fraudulent transfers. Moreover, as  
12 the recipient of a fraudulent transfer, Lehman Commercial's asserted claims will be  
13 disallowed pursuant to § 502(d) of the Bankruptcy Code.

14  
15 **B. Lehman Commercial is Not Entitled to Relief Pursuant to § 362(d)(1)**

16 Section 362(d)(1) of the Bankruptcy Code provides, in relevant part:

17 On request of a party in interest and after notice and a hearing,  
18 the court shall grant relief from the stay provided under  
19 subsection (a) of this section, such as by terminating,  
20 annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an  
interest in property of such party in interest.

21 "Cause" is not statutorily defined, but is determined on a case-by-case basis. *See In re*  
22 *Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990); *see also In re Conejo*  
23 *Enterprises, Inc.*, 96 F.3d 346, 351 (9th Cir. 1996) ("The decision to grant or deny relief  
24 from the automatic stay is committed to the sound discretion of the bankruptcy court. . .").

25 a. **The Estates' Claims will Render Lehman Commercial**  
26 **Unsecured**

27 As demonstrated above, Lehman Commercial's secured claim in each bankruptcy  
28 case should be subordinated, and the liens securing Lehman Commercial's claims should

1 be avoided and preserved for the benefit of the bankruptcy estates. Alternatively, Lehman  
2 Commercial's liens against the Developments Account and the Developments should be  
3 avoided in their entirety as fraudulent transfers and preserved for the benefit of the  
4 estates. Either way, Lehman Commercial will be unsecured and, therefore, not entitled to  
5 adequate protection. The Court should not permit Lehman Commercial to foreclose on  
6 liens that can and will be completely eliminated. This is especially so where, as here, the  
7 movant is bankrupt and the Trustee's recovery will likely be limited to the collateral, and  
8 where the estates' claims, such as the claims for equitable subordination, will be  
9 eliminated if relief from the automatic stay is granted.

10 b. Lehman has Failed to Prove the Amount of its Claim and the  
11 Amount of Equity in the Development Account

12 The guarantees and security interests granted by the Subsidiary Debtors to  
13 Lehman Commercial are limited by fraudulent transfer law. The First Lien Guarantee and  
14 Collateral Agreement (the "Guarantee") provides that:

15 Anything herein or in any other Loan Document to the contrary  
16 notwithstanding, (i) the maximum liability of each Guarantor  
17 hereunder and under the other Loan Documents shall in no  
18 event exceed the amount which can be guaranteed by such  
19 Guarantor under applicable federal and states laws relating to  
fraudulent conveyances or transfers or the insolvency of  
debtors (after giving effect to the right of contribution [against  
other Guarantors]. . . .

20 (See Lehman Relief Mot., Ex B, at bate stamp 124, First Lien Guarantee and Collateral  
21 Agreement § 2.1(b).)

22 To determine the amount that each Subsidiary Debtor might owe under the  
23 Guarantee, Lehman Commercial must demonstrate the amount fraudulent transfer law  
24 would permit. To do so, Lehman Commercial must provide evidence of, among other  
25 things, whether a Subsidiary Debtor made a transfer or incurred an obligation with actual  
26 intent to hinder, delay, or defraud any creditor of a Subsidiary Debtor, Cal. Civ. Code  
27 §§ 3439.04(a)(1), whether a Subsidiary Debtor received reasonably equivalent value in  
28 exchange for issuing the Guarantee, Cal. Civ. Code §§ 3439.04(a)(2), 3439.04(b)(8) and

1 3439.05, whether a Subsidiary Debtor was insolvent, Cal. Civ. Code §§ 3439.04(b)(9),  
2 3439.05, whether a Subsidiary Debtor was engaged in a business or transaction for which  
3 its remaining assets were unreasonably small in relation to the business or transaction,  
4 Cal. Civ. Code §§ 3439.04(a)(2)(A), or whether a Subsidiary Debtor intended to incur, or  
5 believed or reasonably should have believed that it would incur, debts beyond its ability to  
6 pay as they became due, Cal. Civ. Code §§ 3439.04(a)(2)(B).

7 Lehman Commercial has not and cannot prove that the Subsidiary Debtors are  
8 liable in the amount of \$244 million (under the First Lien Credit Agreement) as asserted in  
9 its moving papers. As discussed above, the Subsidiary Debtors clearly did not receive  
10 reasonably equivalent value when they incurred the obligations under the Guarantees and  
11 granted Lehman Commercial security interests to secure those obligations. Because  
12 Lehman Commercial has failed to prove the amount of debt guaranteed by the Subsidiary  
13 Debtors, it has failed to prove the amount of the its liens and, thus, the lack of equity in the  
14 Developments. Accordingly, Lehman Commercial has failed to prove that it is entitled to  
15 adequate protection.

16 c. Lehman Failed to Prove that its Collateral is Currently  
17 Declining in Value

18 Even assuming that Lehman Commercial's liens are valid, as an undersecured  
19 creditor, Lehman Commercial is entitled to adequate protection only to the extent that the  
20 value of the collateral is declining. *See United Sav. Ass'n of Texas v. Timbers of Inwood*  
21 *Forest Assoc., Ltd.*, 484 U.S. 365 (1988); *see also In re Cambridge Woodbridge*  
22 *Apartments, LLC*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003) (stating that, to prevail  
23 under § 362(d)(1), a creditors must establish, among other things, "a decline in the value  
24 of the collateral securing the debt. . ."). However, while Lehman Commercial has provided  
25 evidence of the value of the Developments as of March, 2008 (approximately 6 months  
26 prior to the petition pates), it has not provided any evidence that the Developments are  
27 *currently* declining in value, which is the appropriate test. *See In the Matter of Continental*  
28 *Airlines, Inc.*, 146 B.R. 536, 542 (Bankr. D. Del. 1992) (stating that a creditor is entitled to

1 adequate protection only to the extent that the collateral declined in value after the motion  
2 for adequate protection was filed). As such, Lehman Commercial has failed to prove that  
3 it is entitled to adequate protection.

4 The Trustee provided evidence that the value of the Developments is stable. Larry  
5 Wasbin, MAI, a senior appraiser at Frauenthal & Associates, Inc., testifies that the  
6 residential land values in the areas of the Developments have not materially declined  
7 since the Petition Dates. (See Declaration of Larry Wasbin at 2, ¶ 10.) By obtaining  
8 authority to use cash collateral, the Trustee can pay the expenses necessary to preserve  
9 the value of the Developments, thereby preventing the neglect complained of by Lehman  
10 Commercial, and the Trustee will continue to seek Court authority to do so for the  
11 pendency of these cases. Moreover, the value of the Developments is arguably  
12 enhanced by the commencement of these cases by staying Lehman Commercial's  
13 foreclosure efforts and providing a mechanism to maximize value of the collateral through  
14 a controlled reorganization or sale process. Lastly, since the Trustee controls the Debtors'  
15 books and records, entitlements, permits, reports and assessments, a buyer would likely  
16 to pay much more for the Developments than in a foreclosure sale where records will be  
17 difficult to find and a transition is not orderly.

18 In sum, if the Trustee prevails on his claims against Lehman Commercial, Lehman  
19 Commercial will be rendered totally unsecured. Moreover, Lehman Commercial has failed  
20 to carry its evidentiary burden. Lehman Commercial has failed to prove the amount of its  
21 claims, the equity in its collateral, and that its collateral is currently declining in value.  
22 Therefore, Lehman Commercial has failed to prove that it is entitled to adequate  
23 protection, which it must do to obtain the relief it seeks. *See In re Elmore*, 94 B.R. 670,  
24 677 (Bankr. C.D. Cal. 1988). In contrast, the Trustee has provided evidence that the  
25 Developments are stable and, arguably, increasing in value. Accordingly, Lehman  
26 Commercial is not entitled to relief from the automatic stay pursuant to § 362(d)(1).

**C. Lehman is Not Entitled to Relief Pursuant to § 362(d)(2)**

Section 362(d)(2) provides that the Court shall grant relief from the automatic stay, "if--(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." To meet its burden of proving that property is necessary to an effective reorganization, a debtor must prove that there is a "reasonable possibility of a successful reorganization within a reasonable time." The United States Supreme Court has held:

Once the movant under § 362(d)(2) establishes that he is an undersecured creditor, it is the burden of the debtor to establish that the collateral at issue is "necessary to an effective reorganization." What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means, as many lower courts, including the en banc court in this case, have properly said, that there must be "a reasonable possibility of a successful reorganization within a reasonable time."

*Timbers*, 484 U.S. at 375-76. Pursuant to § 362(g)(1), the party requesting relief from the automatic stay has the burden of proving the debtor's equity in the subject collateral.

**1. Lehman Failed to Prove that the Debtors Lack Equity in the Developments and Other Collateral**

Lehman Commercial failed to carry its statutory burden and prove that the Debtors lack equity in the Developments and other collateral. As discussed above, Lehman Commercial provides no evidence, explanation, or argument as to the amount guaranteed by the Subsidiary Debtors, and thus, has not shown a lack of equity in the Developments. In short, Lehman Commercial has not and cannot demonstrate that the amount of the debt owed to it by the Subsidiary Debtors exceeds the value reflected in its appraisals.

**2. The Amount of Equity is in Dispute**

The amount of equity available for the estates is in dispute. As discussed above, the Trustee can create substantial equity in the Developments and the Development Account based on the estates' claims against Lehman Commercial. Whether the Trustee

1 succeeds in avoiding and preserving Lehman Commercial's liens in their entirety or,  
2 alternatively, subordinating Lehman Commercial's secured claims and transferring  
3 Lehman Commercial's liens to the estates, Lehman Commercial will be unsecured. Under  
4 either scenario, the liens previously held by Lehman Commercial will be held by the  
5 estates, thereby preventing any junior secured creditors from improving their position.  
6 Thus, any value generated by the Developments that would have previously been paid to  
7 Lehman Commercial will be available to the estates

8 **3. The Trustee will File a Plan that has a Reasonable Possibility of**  
9 **Being Confirmed Within a Reasonable Time**

10 The Developments and the Development Account are unquestionably necessary  
11 for an effective reorganization beginning with the commencement of suit against Lehman  
12 Commercial. The Trustee's plan will focus on the estate's claims against Lehman  
13 Commercial and other secured creditors, and the elimination and/or reduction of the liens  
14 against the property of these estates. As demonstrated above, the bankruptcy estates  
15 have significant claims, which, if successful, will enable the Trustee to avoid or at least  
16 reduce the liens against the Developments and other collateral, and preserve those liens  
17 for the benefit of the estate. The Trustee will then use the estate property to provide a  
18 meaningful distribution through a chapter 11 plan. More specifically, the Trustee can  
19 pursue outside financing opportunities and/or the development or sale of the  
20 Developments, and use the resulting proceeds to fund a plan. The Trustee is already  
21 engaged in active negotiations that may result in plan funding and is considering  
22 alternative transactions to maximize value for the estates. While the Trustee pursues his  
23 plan and litigation, the value of the Developments will be maintained through the use of  
24 cash collateral or, potentially, debtor in possession financing.

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**D. Lehman Commercial has Acted in Bad Faith and Prevented the Trustee from Fairly and Fully Defending the Estates Against the Lehman Relief Motions**

On October 5, 2008, Lehman Commercial filed its own chapter 11 in the Southern District of New York. Lehman's chapter 11 case is being jointly administered with many other Lehman Brothers related chapter 11 cases, with the lead case being *In re Lehman Brothers Holding, Inc. et al*, Case Number 08-13555 (collectively, the "Lehman Bankruptcy Cases").

Since October 30, 2008 (the day following the Trustee's appointment), the Trustee has repeatedly requested that Lehman Commercial stipulate to relief from the automatic stay imposed by the commencement of its bankruptcy case. The Trustee seeks relief from the automatic stay to serve discovery on Lehman Commercial, Lehman Lakeside, and potentially other Lehman-affiliated entities, and to assert any and all affirmative claims, as necessary, to defend the Lehman Relief Motions and resolve Lehman Commercial's secured and unsecured claims. The Trustee requested that Lehman Commercial stipulate to relief from the automatic stay, as opposed to simply proceeding with the necessary discovery and adversary proceedings, because the Trustee does not want to expose the bankruptcy estates to sanctions for willful violation of the automatic stay, a concept that is interpreted broadly by the Second Circuit.

Incredibly, Lehman Commercial has been uncooperative with the Trustee's efforts to expeditiously obtain relief from the automatic stay in advance of the Trustee's deadline to oppose the Lehman Relief Motions. Lehman Commercial initially requested that the Trustee prepare a stipulation regarding the termination of the automatic stay, and then refused to execute the stipulation prepared by the Trustee's counsel. Now, Lehman Commercial requests that the Trustee disclose his proposed discovery informally, and



1 allow Lehman Commercial the ability to decide in its sole discretion, whether to comply  
2 with the Trustee's discovery requests.<sup>12</sup> This is unacceptable.

3 Lehman Commercial is attempting to foreclose on substantial assets of these  
4 estates, and the Trustee should be permitted to defend these estates without limitation.  
5 Moreover, the estates have significant claims against Lehman Commercial, which directly  
6 impact the validity of its security interests and the estates' equity in the Developments.  
7 Lehman Commercial's procedural gamesmanship should not be rewarded. Lehman  
8 Commercial should not be permitted to stand behind the automatic stay imposed by its  
9 own bankruptcy case, thereby preventing the Trustee from attacking validity of Lehman  
10 Commercial's security interests, while seeking affirmative relief from this Court based on  
11 those same interests. For these reasons alone, the Lehman Relief Motions should be  
12 denied, or at a minimum, continued, because the Trustee has not been afforded the  
13 opportunity to fairly defend these estates. This is especially so since the value obtained  
14 from the Developments and other collateral will likely be the only source of recovery for  
15 the estates in the short term should the Trustee prevail against Lehman Commercial,  
16 Lehman Lakeside, and/or other Lehman related entities.

17  
18 **E. Notice of the Lehman Relief Motions was Improper**

19 Pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(1) and Local  
20 Bankruptcy Rule 9013-1(a)(5), in a chapter 11 case, notice of a relief from stay motion  
21 must be provided to the United States trustee, the debtor and debtor's counsel, any  
22 chapter 11 trustee, and any committee of unsecured creditors or, if no committee is  
23 appointed, then the 20 largest general unsecured creditors. *See Fed. R. Bankr.*  
24 *P. 4001(a)(1); see also Local Bankruptcy Rule 9013-1(a)(5).*

25 \_\_\_\_\_  
26 <sup>12</sup> A copy of this proposed stipulation and email correspondence between counsel for the Trustee and  
27 Lehman Commercial are attached to the Declaration of Evan D. Smiley as Exhibits "G" and "H,"  
28 respectively.


1 As of the date the Lehman Relief Motions were filed, the bankruptcy schedules had  
2 not been filed by the Debtors. As such, Lehman Commercial could not serve notice of the  
3 Lehman Relief Motions on the 20 largest general unsecured creditors for each Debtor as  
4 required by the applicable bankruptcy rules. Moreover, many of these creditors may not  
5 have received notice of the chapter 11 bankruptcy cases due the fact that the master  
6 mailing matrix of creditors in the Debtors' cases was not filed until November 6, 2008.  
7 The 20 largest unsecured creditors have significant claims against these estates, and are  
8 entitled to notice of the Lehman Relief Motions to protect their interests. On this basis  
9 alone, the Court should deny the Lehman Relief Motions, or at minimum continue the  
10 hearings to provide for proper notice.

11  
12 **IV. CONCLUSION**

13 Based on the foregoing, the Trustee respectfully requests that the Court deny the  
14 Lehman Relief Motions, or at a minimum, continue the hearings in the Lehman Relief  
15 Motions for proper notice.

16 Dated: November 13, 2008

WEILAND, GOLDEN  
SMILEY, WANG EKVALL & STROK, LLP

17  
18 By:   
19 EVAN D. SMILEY  
20 Proposed General Bankruptcy  
21 Counsel for Chapter 11 Trustee  
22 Alfred H. Siegal  
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27  
28

**PROOF OF SERVICE**

STATE OF CALIFORNIA,  
COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 650 Town Center Drive, Suite 950, Costa Mesa, California 92626.

On November 13, 2008, I served the foregoing document described as **OMNIBUS OPPOSITION OF CHAPTER 11 TRUSTEE TO MOTIONS FOR RELIEF FROM THE AUTOMATIC STAY FILED BY LEHMAN COMMERCIAL PAPER INC., MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF ALFRED SIEGEL, HOWARD GROBSTEIN, EVAN SMILEY AND LARRY WASBIN MAILED SEPARATELY**. on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

☒ BY MAIL

☐ I deposited such envelope in the mail at Costa Mesa, California. The envelope was mailed with postage thereon fully prepaid.

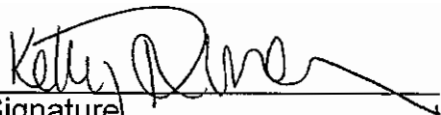
☒ I deposited such envelope with the firm for collection and processing. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on November 13, 2008, at Costa Mesa, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under the penalty of perjury under the laws of the United States of America that the above is true and correct.

Kelly M. Rivera  
Type or print name

  
Signature

In re **LBREP/L—SunCal Master I LLC**  
Case No.: 8:08-bk-15588-ES  
Revised: November 11, 2008 (MS)

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PROOF OF SERVICE

In re **LBREP/L—SunCal Master I LLC**  
Case No.: 8:08-bk-15588-ES  
Revised: November 11, 2008 (MS)

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PROOF OF SERVICE

In re **LBREP/L—SunCal Master I LLC**  
Case No.: 8:08-bk-15588-ES  
Revised: November 11, 2008 (MS)

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PROOF OF SERVICE



In re **LBREP/L—SunCal McAllister Ranch LLC**  
Case No.: 8:08-bk-15637-ES  
Revised: November 11, 2008 (MS)

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PROOF OF SERVICE

In re **LBREP/L—SunCal Summerwind Ranch LLC**

Case No.: 8:08-bk-15640-ES

Revised: November 11, 2008 (MS)

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| 20 | Schilling Corporation<br>695 Greenfield Drive<br>El Cajon, CA 92021<br>Facsimile: 619-579-3733             | Signs & Pinnick, Inc.<br>P.O. Box 945<br>El Cajon, CA 92022-0945<br>Facsimile: 619-579-0719                                   |
| 23 | Southern California Pipeline<br>1100 Irvine Blvd., Suite 37<br>Tustin, CA 92780<br>Facsimile: 714-838-0222 | Stantec<br>22690 Cactus Avenue, Suite 300<br>Moreno Valley, CA 92553<br>Facsimile: 951-653-5308                               |
| 25 | SunCal Management, LLC<br>2392 Morse Avenue<br>Irvine, CA 92614<br>Facsimile: 949-777-4050                 | Superior Masonry, Inc.<br>300 W. Olive Street, Suite A<br>Colton, CA 92324<br>Facsimile: 909-370-2992                         |

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4 Lehman Commercial Paper, Inc.  
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New York, NY 10019  
5 **FIRST LIEN LENDER**

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10 New York, NY 10170-0002  
11 **SECOND LIEN LENDER**

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Case No.: 8:08-bk-15639-ES  
Revised: November 11, 2008 (MS)

**SERVICE LIST—20 LARGEST**

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| 5  | AEI-CASC Engineering, Inc.<br>937 S. Via Lata, Suite 500<br>Colton, CA 92324<br>Facsimile: 909-783-0108  | All American Asphalt<br>P.O. Box 2229<br>Corona, CA 91718<br>Facsimile: 951-736-4671               |
| 8  | Genesis Construction<br>P.O. Box 7067<br>Hemet, CA 92545<br>Facsimile: 951-925-6585                      | Group Seven Landscape Dev. I<br>45655 Reagan Way, Suite J<br>Murrieta, CA 92563                    |
| 10 | Homebuyers Guide Real Estate<br>17780 Fitch, Suite 195<br>Irvine, CA 92614<br>Facsimile: 949-476-3071    | KIP Incorporated<br>25740 Washington Avenue<br>Murrieta, CA 92562<br>Facsimile: 951-698-7898       |
| 13 | Nissho of California<br>1902 South Santa Fe Avenue<br>Vista, CA 92083<br>Facsimile: 760-727-8706         | Outdoor Dimensions<br>5325 E. Hunter Avenue<br>Anaheim, CA 92807<br>Facsimile: 714-693-9578        |
| 15 | Pacific Soils Engineering, I<br>P.O. Box 2249<br>Cypress, CA 92630<br>Facsimile: 714-220-9589            | Pacific States Engineering<br>29992 Hunter Rd., Suite 105-102<br>Murrieta, CA 92563                |
| 18 | Palm Canyon Contractors, Inc.<br>P.O. Box 656<br>Yucaipa, CA 92399                                       | Rohm Insurance Agency<br>26 Plaza Square, Suite 200<br>Orange, CA 92866<br>Facsimile: 714-516-2965 |
| 20 | Sierra Pacific Electrical Co.<br>2542 Avalon Street<br>Riverside, CA 92509<br>Facsimile: 951-784-4489    | So. Cal Sandbags, Inc.<br>12620 Bosley Lane<br>Corona, CA 92883-6358<br>Facsimile: 951-277-2303    |
| 23 | Southwestern Equipment LLC<br>5520 Walesley Street, #100<br>La Mesa, CA 91942<br>Facsimile: 619-469-1707 | SunCal Management, LLC<br>2392 Morse Avenue<br>Irvine, CA 92614<br>Facsimile: 949-777-4050         |
| 25 | Superior Masonry, Inc.<br>300 W. Olive Street, Suite A<br>Colton, CA 92324<br>Facsimile: 909-370-2992    | TNT Grading, Inc.<br>268 Redel Road.<br>San Marcos, CA 92078<br>Facsimile: 760-736-4057            |

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